

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 121 of 2018
[High Court at Suva Criminal Case No. HAC 161 of 2018]

BETWEEN : **SAILOSI VIRIKIBAU VUNIDAKUA**

Appellant

AND : **STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. M. Fesaitu for the Appellant**
: **Mr. R. Kumar for the Respondent**

Date of Hearing : **17 August 2022**

Date of Ruling : **19 August 2022**

RULING

- [1] The appellant had been indicted in the High Court on a single count of robbery in the company of another contrary to section 311(1)(a) of the Crimes Act, 2009 committed with another on 20 April 2016 at Nabua in the Central Division.
- [2] After the majority of assessors and learned High Court judge found him guilty the appellant was sentenced on 28 September 2018 to an imprisonment of 09 years, 06 months and 20 days with a non-parole period of 07 years, 06 months and 20 days.
- [3] Though, the appellant appealed against conviction and sentence, he was allowed leave to appeal only against sentence by the single judge at the leave stage. The ground of appeal on which leave was granted is as follows:

Ground 1 - *THAT the learned Magistrate erred in law by imposing a sentence deemed harsh and excessive without having regard to the sentencing guideline and applicable tariff for the offence of aggravated robbery of this nature.*

- [4] The evidence against the appellant could be summarised as follows. The complainant had wanted to pawn his tools of trade mentioned in the information to raise money and gone to a scrap dealer but the latter had refused to accept them. He had met a boy named Livai there who had taken him to another person who too had refused to take the items. Thereafter, both had met another person whom he came to know as Sailosi (*i.e.* the appellant) in the conversation. Both Sailosi and Livai had agreed to show the complainant a place to pawn his items. Livai had led the party while Sailosi had followed the complainant when they were walking along a narrow path in between houses. While walking the appellant had punched the complainant from behind and he had fallen down and while the complainant was lying he had been punched and kicked by the appellant who had pulled a knife and threatened the complainant not to follow him. The appellant had walked away with the complainant's bag containing the two grinders while Livai had run away with the bag containing the welding plant.
- [5] The complainant had managed to find Livai's house with the help of neighbours but Livai had not yet returned home. Livai had come home in the early hours of the 20th morning and when inquired about the tools he had said that they were taken from him by the police. The complainant had gone to Nabua police station in search of his tools and while he was talking to PW2, police officer Deven Suami he had seen through a door opened by another officer the appellant in handcuffs inside the police station. He had immediately identified the appellant, pointed at him and told PW2 *'That's the Sailosi who robbed me'*.
- [6] The police had taken the appellant out to recover the lost articles and recovered the bag with two grinders on being shown by the appellant.

[7] Granting leave to appeal against sentence, the Ruling said as follows:

[33] *The factual background of this case may not exactly fit into the kind of situation court was confronted with in **Wise**. Neither is this a case of simple street mugging as identified in **Raqauqau v State** [2008] FJCA 34; AAU0100.2007 (4 August 2008) where the Court of Appeal set the tariff for the kind of cases of aggravated robbery labelled as ‘street mugging’ at 18 months to 05 years with a qualification that the upper limit of 5 years might not be appropriate if certain aggravating factors identified by court are present. Nor does it appear to be similar to offences of aggravated robbery against providers of services of public nature including taxi, bus and van drivers where the settled range of sentencing tariff is 04 years to 10 years of imprisonment subject to aggravating and mitigating circumstances and relevant sentencing laws and practices [vide **Usa v State** [2020] FJCA 52; AAU81.2016 (15 May 2020)].*

[34] *There does not appear to be a settled range of sentences for the kind of aggravated robbery the appellant had committed against the complainant. Therefore, the trial judge cannot be unduly criticised for taking a starting point of 08 years based on **Wise** and ending up with the ultimate sentence of 09 years, 06 months and 20 days with a no-parole period of 07 years, 06 months and 20 days.*

[37] *It appears to me that a sentence of less than the lower end of tariff for home invasions (i.e. less than 08 years) would have been appropriate in the case of the appellant so as the sentence to be proportionate to the gravity of the offence in the light of existing sentencing tariff regimes for different kinds of aggravated robbery.*

[38] *Nevertheless, whether the ultimate sentence of 09 years, 06 months and 20 days imposed on the appellant is justified or not should be decided by the full court in view of the possible sentencing error of applying **Wise** tariff. If so, the full court would decide what the ultimate sentence should be exercising its power to revisit the sentence under section 23(3) of the Court of Appeal Act after a full hearing.*

[39] *For the above reasons, though I cannot affirmatively say that the appellant has a reasonable prospect of success I tend to grant leave to appeal against sentence.*

Bail pending appeal

[8] The legal position is that the appellant has the burden of satisfying the appellate court firstly of the existence of matters set out under section 17(3) of the Bail Act namely (a) the likelihood of success in the appeal (b) the likely time before the appeal hearing

and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard. However, section 17(3) does not preclude the court from taking into account any other matter which it considers to be relevant to the application. Thereafter and in addition the appellant has to demonstrate the existence of exceptional circumstances which is also relevant when considering each of the matters listed in section 17 (3). Exceptional circumstances may include a very high likelihood of success in appeal. However, an appellant can even rely only on ‘exceptional circumstances’ including extremely adverse personal circumstances when he fails to satisfy court of the presence of matters under section 17(3) of the Bail Act [vide **Balaggan v The State** AAU 48 of 2012 (3 December 2012) [2012] FJCA 100, **Zhong v The State** AAU 44 of 2013 (15 July 2014), **Tiritiri v State** [2015] FJCA 95; AAU09.2011 (17 July 2015), **Ratu Jope Seniloli & Ors. v The State** AAU 41 of 2004 (23 August 2004), **Ranigal v State** [2019] FJCA 81; AAU0093.2018 (31 May 2019), **Kumar v State** [2013] FJCA 59; AAU16.2013 (17 June 2013), **Qurai v State** [2012] FJCA 61; AAU36.2007 (1 October 2012), **Simon John Macartney v. The State** Cr. App. No. AAU0103 of 2008, **Talala v State** [2017] FJCA 88; ABU155.2016 (4 July 2017), **Seniloli and Others v The State** AAU 41 of 2004 (23 August 2004)].

- [9] Out of the three factors listed under section 17(3) of the Bail Act ‘likelihood of success’ would be considered first and if the appeal has a ‘very high likelihood of success’, then the other two matters in section 17(3) need to be considered, for otherwise they have no direct relevance, practical purpose or result.
- [10] If an appellant cannot reach the higher standard of ‘very high likelihood of success’ for bail pending appeal, the court need not go onto consider the other two factors under section 17(3). However, the court may still see whether the appellant has shown other exceptional circumstances to warrant bail pending appeal independent of the requirement of ‘very high likelihood of success’.
- [11] It is clear from the leave to appeal Ruling that leave to appeal against sentence had been allowed due to the lack of established tariff for the kind of offending the appellant was convicted with and because the adoption of **Wise** sentencing tariff was


held to be wrong. Therefore, the Ruling has stated that it cannot be said affirmatively that the appellant has a reasonable prospect of success leave aside a very high likelihood of success in his appeal against sentence in the sense that his current sentence would be drastically reduced to the level of a sentence in a simple street mugging case though the full court may adjust the sentence downwards in some way.

- [12] Though, it is now not technically required, I shall still consider the second and third limbs of section 17(3) of the Bail Act namely '*(b) the likely time before the appeal hearing and (c) the proportion of the original sentence which will have been served by the appellant when the appeal is heard*' together.
- [13] The appellant has so far served 03 years and 10 ½ months of imprisonment. It cannot at this stage be reasonably assumed that given all the circumstances surrounding the offending, the sentence to be imposed on the appellant by the full court would likely to be around that period. It is for the full court to decide on the ultimate appropriate sentence [vide (**vide Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May 2006) & **Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015))].
- [14] In all the circumstances, it appears that there is no possibility of the appellant having to serve a sentence longer than he deserves if he is not enlarged on bail pending appeal at this stage. Further, given that the currently appeal records are being prepared for the hearing of the appellant's appeal before the full court, I think that it is not in the interest of justice to consider section 17(3) (b) and (c) in favour of the appellant at this stage.
- [15] Therefore, I am not inclined to allow the appellant's application for bail pending appeal and release him on bail at this stage. If however, there is an undue delay in the appellant's appeal being listed for full court hearing, he may file a bail pending appeal application at that stage afresh.

Order

1. Bail pending appeal is refused.




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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL